Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 130.

HOWE SCALE COMPANY OF 1886 AND FAY-SHOLES COMPANY, PETITIONERS,

vs.

WYCKOFF, SEAMANS & BENEDICT, RESPONDENT.

MEMORANDUM AND REPLY BRIEF.

A cursory reading of the "Brief of Argument for Complainant-Appellee," discloses errors of statement which make it advisable to file a short memorandum in reply, pointing out some of the errors and stating in shorter form than in the original brief one of the grounds on which we ask a reversal of the decree herein.

We find no justification for the statement on page 4 of Brief of Argument for Complainant-Appellee, as follows:

> "Soon after the Remington-Sholes Company ceased "to use the name 'Remington' in its corporate name "and business, and upon its machines, Franklin Rem-"ington left the employ of that company, and ceased

"to have any active connection therewith, becoming "President and General Manager of the Foundation "& Contracting Company, a corporation under the "laws of the State of New York, and has since mainly, "if not wholly, devoted his time and attention to the "business of the Foundation Company in the City of "New York."

The statement seems improper if it be an attempt to prejudice the Remington-Sholes Company. The statement was made for the first time as a ground for opposing the Remington-Sholes Company's petition for *certiorari,* and was then met fully.

The first italicized quotation on page 178 is put forth as a completed sentence. It is not such in the original. There the clause quoted ends with a *comma,* and is followed by the words *"but it is not to be confused in any way with the latter machine."* (R., 887.)

On page 193 the quotation from Mr. Remington's affidavit is stated as follows:

"4. That my machines manufactured in Chicago "are known here by the name "Remington-Sholes.'"

This, again, is put forth as a completed sentence. In the original the word "Remington-Sholes" is followed by a *comma,* and the words "and should not be confounded with any other machines bearing the name 'Remington.'"

On page 271 is the statement of a list of names which are said to have been used by *"appellants* and their *agents* and *dealers."* The fact is that neither the Remington-Sholes Company, nor any of its agents, used any of the following names: "Remington Imperial," "Remington Typewriters," "New Model Remington," "Genuine Remingtons." None of the other names are objectionable.

The statement in the brief *implies* the use of all the names by *all* members of the class denominated under the description "appellants *and* their *agents and* dealers," and to that extent the statement is misleading and substantially contrary to the stipulation. (R., 662.) Like misleading use of the expression "agents and dealers" is found on p. 186, and upon pp. 4 and 8, and elsewhere in "Complainant-Appellee's Brief on Motion to Suppress Evidence." For a more extended discussion of this matter we would invite the attention of this Court to pp. 128-135 of our main brief.

The important questions are: First, Has the defendant the right to use its corporate name, "The Remington-Sholes Company"? second, Has it the right to designate its machines by its registered trade-mark "Rem-Sho"?

The second question is one of fact peculiar to this case, and the unanimous decision of the Court of Appeals affirming defendant's right to the trade-mark, "Rem-Sho," and the full consideration of this question in defendant's main brief render further discussion unnecessary. The first question is one of wider importance, because it involves the determination for the first time by this court of the extent to which the use of a personal name in connection with a corporate enterprise may be restricted by reason of the prior adoption of such name as a trade-mark.

Every suit like the present is predicated upon two propositions: that complainant has some right to the trade name in question, and that defendant has trespassed upon such right.

What is the measure of complainant's right to the name "Remington" as determined by the decisions of this court? That a personal name is incapable of exclusive appropriation is axiomatic. This court has also said that every one has the same right to the use of his name as he has to the

use of his other property. He may not, however, use it in such manner as to accomplish "a fraud upon another." (*Brown Chemical Company* v. *Myer,* 139 U. S., 540.)

When a name has acquired more or less of a secondary meaning; that is, when it has come to denote the goods of a particular maker, then others who use that name must accompany the use "with such indications as to show that the thing manufactured is the work of the one making it." (*Singer Mfg. Co.* v. *June Mfg. Co.,* 163 U. S., 169.)

The use of a personal name as the whole or part of a corporate name is universally recognized as legitimate, a fact which the court may notice judicially. If this be true, then the use of the personal name Remington in the corporate name, Remington-Sholes Company, brings this case clearly within the language of this court in the case of Brown Chemical Company, *supra,* and it follows that complainant cannot monopolize such use.

This leaves open only the inquiries: (1), As to whether a fraud upon complainant was "manifestly intended" by defendant, and (2), Whether defendant has accompanied its use of the name with such indications as show that its goods are in fact of its own manufacture. If the answer to the second of these questions be in the affirmative, it must necessarily imply a negative answer to the first, because if defendant when using a personal name incapable of exclusive appropriation has marked its machines so as to show clearly that they are of its own manufacture, then this fact disproves the charge that it has attempted to pass them off for those of complainant.

But in this case it is not necessary to rely upon such inference. The testimony of Mr. Sholes, when speaking as a witness for complainant, conclusively shows that there was no fraudulent intent in the adoption of the name

"Remington-Sholes Company." This witness, offered by complainant, was the only one who testified as to the history of the adoption by defendant of the name Remington-Sholes, and his testimony was so direct and true as to render all other unnecessary. Not only does Mr. Sholes say repeatedly (R. 439, 440) that there was no purpose to confuse defendant's with complainant's machines, but the whole history of the Remington-Sholes Company, as given by him, shows that its organization and name occurred in the most natural and usual way and without the slightest taint of fraud.

Mr. Sholes's first machine was, as he says, "invented and made by himself" (R. 399). Mr. Smith and Mrs. Mulliken thereafter contributed money towards exploiting it, but it bore the impress of no personality save that of Mr. Sholes. Naturally, therefore, following a common custom of the typewriter trade, he named this machine after himself, the "Z. G. Sholes," and for like reason named the attempted Wisconsin corporation the "Z. G. Sholes Company." The names of Smith and Mulliken had no family reputation that would prompt their use.

When Z. G. Sholes met Franklin and Carver Remington, in 1893, Franklin Remington abandoned all other business, and devoted his entire time, with Sholes, to the perfecting and exploiting of the machine, and to this end invested fifteen thousand dollars. *This was before any question of the naming of the machine arose.* Their aim was to attain what Mr. Sholes said they did attain, viz.: "the best machine that had ever been built." (R., 429.) The name was of such minor importance that Sholes says he changed it without even consulting the Remingtons at all, and that when they sought to enlist the interest of complainant's president, Mr. Seamans, and the Remington Arms Company, the ma-

chine still bore the name of Mr. Sholes alone. The testimony of Mr. Sholes conclusively shows (R., 404, 413) that the efforts of himself and the Remingtons were directed towards securing financial aid from others for manufacturing "the best machine that had ever been built," and in the negotiations to that end not one word was spoken in regard to the name that would be given to the machine, or to the company to be organized for its manufacture. (R., 417.)

When Mr. Franklin H. Head and Mr. C. N. Fay, of Chicago, became interested early in 1894 with Sholes and the Remingtons, it was evidently the machine that attracted them, for so little attention was paid to the name that, as Mr. Sholes testifies, "there was no discussion about it." (R., 428.) And the only instance that Mr. Sholes is able to give of any expression by Mr. Fay concerning the name, was late in 1895, more than a year and a half after the Remington-Sholes Typewriter Company had been in business. (R., 419.)

Not only do these facts evidence the absence of any attempt to trade unfairly upon the name "Remington," but the testimony of Mr. Sholes makes it plain that the name "Remington-Sholes" was given to the machine by him alone, and without the knowledge of the others, in recognition of the fact that Franklin Remington had devoted his entire time (R., 428) and had furnished the entire capital towards the perfecting and exploiting of the machine. (R., 430, 429.) Complainant's own testimony, therefore, conclusively shows the absence of fraudulent purpose in the adoption of the name.

Upon the organization of the Remington-Sholes Typewriter Company, Franklin Remington at once became its general manager, and Sholes its superintendent, and to them the entire management of the business for the first year

and a half, was entrusted (R., 434). At the outset they were warned by complainant against using in any manner either of their names, and to this warning Franklin Remington (R., 1444) replied, that upon the advice of counsel, they had the right to use their names and that "in using our names, the right to which we have never alienated, we have scrupulously avoided all deception of the public, both in the superficial appearance and the construction of our machine, and in all our printed and verbal representations regarding it."

When the Remington-Sholes Typewriter Company was incorporated, it found complainant's machine colored in the conventional black enamel, common to all other typewriting machines upon the market and known the world over (as the bill of complaint asserts) by the names "Remington Standard," and "Remington." It found such machines invariably marked with the complainant's "Red Seal" trade-mark, and with the words "Remington Standard Typewriter, manufactured by Wyckoff, Seamans & Benedict, Ilion, New York, U. S. A."

It simulated none of these *indicia*. On the contrary, it constructed its machine with a highly ornamental bronzed frame, thus clearly distinguishing it in appearance from all others upon the market. It marked every machine conspicuously with both the name and address: "Remington-Sholes, Chicago." (R., 1101; 1445). To avoid still further the possibility of confusion, it advertised the fact that its machine was "not the Remington Standard." It instructed its salesmen, agents and dealers everywhere to explain to prospective purchasers its entire independence of complainant. It distributed broadcast its catalogues, with the notice: "We state, then, emphatically that this company has no connection whatever with that well known and

excellent machine, the Remington Standard Typewriter." It made its signs, letter-heads and advertising matter totally unlike those of complainant. These were not the acts of one seeking to pass off his wares for those of another.

In the Singer case, where attempt was made to monopolize a personal name, this court condemned the defendant solely because of failure to accompany the machines with "a sufficient notice of their *source of manufacture.*" Certainly, in the case at bar defendant has more than fulfilled the requirements prescribed by this court.

The statement, in the opinion of the Court of Appeals (R., 1522), that the use of the name "Remington" in the corporate name "Remington-Sholes Company," "induces many purchasers to suppose that such machines are the product of the old establishment at Ilion," if true in fact, might indicate that defendant's many precautions had been in vain. Indeed, there would seem to be an inconsistency between the statement that "many purchasers" had been deceived and the court's refusal to grant a decree for an accounting. And it will be noticed, too, that this refusal was had notwithstanding defendant had been *sole* agent for the Remington-Sholes Company for a long period prior to this suit. But the record shows (as fully pointed out in defendant's main brief, pp. 145-154) that notwithstanding complainant had hundreds of agents throughout the country in daily contact with users of typewriters, and the fact that it instructed its agents to report to its main office all matters bearing upon this case, yet it has attempted to prove but three instances of purchasers who took defendant's machines for those of complainant. In two of these instances —the Weingart and Stallwood cases—the parties had full information as to the source of manufacture of defendant's machine, and in the third instance—the Downs sale—the

"Rem-Sho" machine was bought on an order simply for "a machine," given by Downs to one Platt, from whom Downs had before purchased Remington machines, and whom he supposed to be still the agent for complainant.

But apparently it was not this error of fact, nor its erroneous finding, that the early machines were marked simply "Remington-Sholes" (whereas the record shows that they were invariably marked "Remington-Sholes, Chicago" (R., 1445, 1101), that led the majority of the Court of Appeals to decree against defendant, for they recognized that under the decision in the Singer case, whatever might be the inconvenience or loss to complainant, incident to the use by Mr. Remington of his name in his individual business, it was *damnum absque injuria*. They based their opinion upon the broad ground that the giving of the names, Remington and Sholes, to a corporation was in itself a fraudulent act. Notwithstanding the finding, that it was the insufficiency of their own means that led Remington and Sholes to secure additional capital from others, the majority of the court say (R., 1527):

> "They chose not to prosecute the typewriter busi-
> "ness themselves; had they done so, good faith towards
> "those dealing with them might make it necessary to
> "use their names; they chose, on the contrary, to asso-
> "ciate themselves with others in the corporation whose
> "name its organizers were free to select."

This ground is plainly untenable under the decisions of this court. In *Brown Chemical Company* v. *Myer, supra*, it was said: "A man's name is his own property, and he has the same right to its use and employment as he has to any other species of property," and again, in the Singer case it was said that one "need only adopt such precautions

as will protect the property of others and prevent an injury to the public; if by doing so no substantial restriction is imposed on the form of use." Is not the universal custom of giving personal names to corporations conclusive that in giving their names to the corporation organized by them Remington and Sholes were exercising their right to use their names in fair and honest fashion, as they might use "any other species of property?" When the court considers that these young men had produced as the result of their effort and capital what they believed to be "the best machine that had ever been built," was it not natural that they should wish to associate their names with it and with the corporation organized by them for its manufacture? Would it not be "a substantial restriction" to deprive them of such use of their name?

The finding of the Court of Appeals that it was fraudulent for the individuals to bestow their names upon a corporation, while admitting their right to use them in individual or partnership business, is based: First, upon an error of fact, and second, upon a misconception of the authorities on which the court relied. In *Goodyear Rubber Co.* v. *Goodyear Rubber Mfg. Co.*, 128 U. S., 598, 602, this court recognized that in cases like the present the use of the name "company" simply implies that persons have associated themselves together in business. The public accepts no other nor more technical meaning of such word. A corporation, like a partnership, creates its own name, and at will it can make prominent or disguise the name of any of its constituents. There is, therefore, no distinction in fact between the meaning attached to a firm name and the same name incorporated. The authorities, since the leading case of *Meneeley* v. *Meneeley*, 62 N. Y., 427, which has been repeatedly approved by this court, are conclusive

that a partnership is free to employ the names of its members.

In most of the cases relied upon by the Court of Appeals the ground of the injunction and the defendants' wrong consisted not in giving a personal name to a corporation, but in giving to the defendant corporation the whole and very name by which complainants' article was known to the trade. Thus in the Higgins' case complainants' soap was universally known as "Higgins' Soap," and defendant called itself "Higgins Soap Company." In the De Long case complainants' wares were known as "The De Long Hook and Eye," and defendant called itself "The De Long Hook and Eye Company." In the Valentine case complainants' meat juice was known as "Valentine Extract," and defendant called itself "Valentine Extract Company." The following language of Lord Alverstone, M. R., in this Valentine case is instructive:

> "I come to the conclusion that by the use of the "words 'Valentine Extract Company' the defendants "were putting on the market goods which would be "enabled to be passed off as the plaintiff's goods, and "were, in fact, carrying on a trade under a name un- "der which they had no right to carry it on, because I "do not think that a person in the present day could "properly use the words 'Valentine's Extract' in con- "nection with meat juice without passing off his goods "as the goods of the plaintiff."

In the Le Page Glue case cited by the Court of Appeals the decision went off upon the ground of estoppel, a fact that destroys its pertinency in the present instance. In the Garrett Snuff case the court that rendered that decision made plain in a later case (*Proctor & Gamble Co.* v. *Globe Co.*, 92 Fed., 357) that the decision was based upon the

ground that Garrett had no material interest in the defendant company, and had permitted the use of his name for the purpose of confusion in trade. In the Clark Thread case what the court said with respect to the corporate name was *obiter dictum*, as complainant had already consented to defendant's use of its corporate name. In none of the foregoing cases did the defendant employ, with equal prominence, two personal names. Indeed an examination of all the authorities relied upon by complainant will show facts such as above mentioned, which distinguish the cases from the case at bar, or will show equally vital points of difference.

The question recurs: Can the plaintiff sustain its extreme contention that under the proofs Franklin Remington has no right to use his family name as part of the corporate title of a corporation, engaged in the business of making and selling typewriters, and that his right to use his family name in that business is restricted to its use by himself, alone, or as a member of a firm?

In order to sustain its extreme contention, the complainant corporation must establish not only that it had the right to style itself the "Remington Standard Typewriter Manufacturing Company," but having once taken that title, even though later it abandoned the name "Remington" as part of a corporate name, no member of the Remington family thereafter could lawfully use his own name as part of the name of a corporation organized for the purpose of making and selling typewriters, no matter how honest his motives or how great his investment. We may notice that this contention is broader even than the allegation in the bill of complaint in which complainant sets forth its exclusive right to the words "Remington" and "Remington Standard" merely as "trade-names, trade-marks and designations," not of *itself*, but of "its *typewriting machines.*"

A court of equity is neither so powerless as to be unable to prevent unfair trade by individuals, nor so unfair as to hamper fair trade by corporations. In short, a court of equity stands for liberalization of fair trade by individuals and corporations alike, and restrains unfair trade by either. An act of unfair trade is no more or no less unfair, when done by a corporation or by an individual.

If a statute providing for the incorporation of business corporations were to exclude from its operation any person, a member of whose family had used the family name in any manner, either as part of a corporate name, or as designating an article of commerce, the statute could not withstand the objection that it deprived some persons of the equal protection of the laws. Yet the complainant seeks a decree which shall have, in substance, the effect of such a statute. Indeed the Congress, in the Trade-Mark Act (21 Stat. at Large, 502, Sec. 3) expressly prohibits appropriation as a trade-mark of a word which is "merely the name of the applicant."

The complainant's position is substantially as follows: "The Remington Standard Typewriter Manufacturing Co." had the right to use the family name "Remington," and this right was of such a nature that the name, having once been used by it in the business of making and selling typewriters, no other member of the Remington family may ever thereafter use the family name even in conjunction with another name to designate a corporation engaged in the same business, even if the person who uses the family name is the son of the original Remington, has invested time, skill and capital in the business, has supervised improvements in the machine and is, in fact, the general manager of the business. Indeed, if the contention be sound, then no Wyckoff, Seamans, or Benedict may here-

after use his own family name as part of a corporate title in the typewriter business.

There remains the concrete question whether, on the proofs, the corporation "Wyckoff, Seamans & Benedict," of Ilion, New York, is entitled to a decree restraining the corporation "Remington-Sholes Company," of Chicago, Ill., from using its corporate name in the business of making and selling typewriters. This inquiry includes necessarily a comparison of the two names "Wyckoff, Seamans & Benedict" and "Remington-Sholes Company." It appears that in 1892 the members of the partnership "Wyckoff, Seamans & Benedict" incorporated themselves under their former firm name and succeeded to the typewriter business which theretofore had been carried on by several successive corporations. It is not improbable that the individuals, Messrs. Wyckoff, Seamans & Benedict, by incorporating under their own names the typewriter business formerly owned by E. Remington & Sons, sought to attach to their own names some of the prestige which had come to surround the name "Remington," and to substitute their own names for that name in that extensive business. Whatever may have been their motive, we cannot disregard the fact that the manufacturer that now seeks the aid of the court is a corporation, and that its name is "Wyckoff, Seamans & Benedict," of Ilion, New York. This fact may not be conclusive, but it may not properly be *excluded* from the inquiry. Neither can we overlook the fact that in 1894, when the corporation "Remington-Sholes Typewriter Company" was incorporated under that title, there was in existence *no* corporation which bore the name "Remington" as part of its corporate title and which was engaged in the typewriter business. If they who in 1892 incorporated themselves under the title "Wyckoff, Seamans

& Benedict" had the right to incorporate under the title "Remington Company," and we may assume that they had the right, they yet voluntarily and unnecessarily chose to incorporate under the title under which this suit is brought.

When all has been said and all the cases have been considered the mind inevitably comes back to the fundamental proposition established by the decisions of this court, that a man has the right to use his name in every fair way, provided he takes the reasonable precautions that every honest man would naturally take to distinguish his wares from those of his rivals. Defendant asks that its conduct be measured by this test and nothing more.

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Supreme Court of the United States,

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No. 130.

HOWE SCALE COMPANY OF 1886 and FAY-SHOLES COMPANY, *Petitioners,*

vs.

WYCKOFF, SEAMANS & BENEDICT.

Memorandum for defendant Howe Scales Co. of 1886.

In 1886, three partners, Messrs. Wyckoff, Seamans & Benedict, incorporated themselves under their firm name. This corporation now claims the right to prevent the corporation The Remington-Sholes Company from using its corporate name in the business of making and selling typewriters. The Remington-Sholes Company is a duly organized corporation.

From what member of the Remington family did these strangers to the blood and name Remington derive a monopoly of that name? How comes it that the sons of Samuel Remington, the former president of the corporation E. Remington & Sons, have been disinherited of their birthright—the same right that Messrs. Wyckoff, Seamans & Benedict had and exercised; the right to do business in their own names

as partners and to incorporate their own business under their own names?

How is it that a corporate act of the corporation E. Remington & Sons in 1886 could deprive persons who took no part therein of the right to use their own names?

These are plain questions, and they were not answered in oral argument. Even the assignment by E. Remington & Sons to Messrs. Wyckoff, Seamans & Benedict reserved to the corporation E. Remington & Sons the right to re-engage in the typewriter business at the end of ten years. If the corporation E. Remington & Sons *had* re-engaged in that business could it not have transferred its rights to The Remington-Sholes Company? The learned counsel for complainant, in oral argument, answered this question in the affirmative. Therefore, the corporation Wyckoff, Seamans & Benedict has no *exclusive* right to the name "Remington." As Franklin Remington had a substantial interest in the rights which were transferred to the Remington-Sholes Company that would seem to end this controversy.

What is the nature of complainant's right to the name "Remington"? It is the right to insist that, when others use the name, the use shall be accompanied by clear statement of the *source* of manufacture. The statement which defendant puts on its machines is the truth, the whole truth, and nothing but the truth. The same may be said of complainant's statement.

If, however, complainant *encourages* the alleged belief of the public that complainant's machines are *still made* by the Remington family, then to that extent the complainant is trading on what is not the *whole* truth.

If, on the other hand, it is known that the manufacturer is the corporation Wyckoff, Seamans & Benedict, then the defendant's statement "Rem-Sho" Remington & Sholes Co., manufacturers, Chi-

cago, excludes the idea that the manufacturers are Wyckoff, Seamans & Benedict of Ilion, N. Y.

The argument which results in the destruction of the right of Messrs. Remington & Sholes to transfer their business rights to a corporation bearing their name is two-fold.

It is said that the business is the business of the corporation and that in naming a corporation it was *unnecessary* to use their names.

True a corporation is a legal entity, and after incorporation and the transfer of the business, the business belongs to the corporation. But *whose* business rights were they that were transferred?

They were the business rights of Messrs. Remington and Sholes. "In reality it is their business. "But for fiction of law such an association would "be a partnership" (see quotation, p. 70 of Brief for Defendant).

If the argument be sound, based on the idea of necessity, it might be said with equal force that it was unnecessary to incorporate at all, or to form a firm, or to give prominence to the name "Remington" in a firm name. The true test is not necessity, but the reasonable exercise of undoubted right.

If Messrs. Remington and Sholes had formed a firm, would the lawful acts of the firm of yesterday become unlawful to-morrow if they should incorporate to-day as the Remington-Sholes Company?

"The plaintiff can be injured no more in his busi-"ness by a corporation than he can by such a firm" (see quotation, p. 70, Brief for Defendant).

It is said in the opinion of the majority in the court below, "the incorporator who elects to trans-"fer his own name * * * to an artificial person "is taking an affirmative step in the direction of "promoting unnecessary confusion instead of "taking precautions to prevent it." Does this

not beg the question? If Remington & Sholes as partners under that *firm* name are within their rights, how can it be that an incorporation under the *same* name is "an affirmative step in the "direction of promoting unnecessary confusion"?

The Court below said that it was admitted that the choice was "intelligent," and added: "This is enough." Enough for what? Enough to warrant the inference of fraud or trick? Is the choice between intelligent and stupid? Is intelligent action alone to deserve the animadversion of the Court, and stupid choice to command approval?

Since we wrote the foregoing, the "Supplemental Brief for Complainant-Appellee" has been received. It is there said (p. 8):

"The case is not one where a corporation takes "over from an individual an established business "and good-will and the name which identifies to "the public that business. It is a case where a "corporation is formed to inaugurate a new busi-"ness and selects for it a name under which to "begin to introduce itself and the origin of its "goods to the public."

And (p. 27):

"There is no occasion to consider what might "have been the result had Mr. Franklin Remington "and Mr. Sholes formed a partnership. *Perhaps* "*had they done so the business might have been re-*"*garded as their business.*"

Can it be that, forming a partnership and doing some business as the firm of Remington & Sholes was required by the principles of equity as a preliminary ceremony to the right to avail themselves of the statutes of Illinois providing for the incorporation of business corporations? That would be to elevate form above substance. The test whether the business was *their* business is not what they did with it but what they put into it, and Remington & Sholes embarked substantially all they owned.

As to present status of the parties.

We desire to submit a final word in explanation of the status of this case, to the end that the Court may see that this controversy is indeed a real one and that, aside from the questions of public importance involved, the interests of the Fay-Sholes Company (formerly named the Remington-Sholes Company) are of magnitude.

The following facts appearing from the petition for *certiorari* will not be denied.

The final decree of the Circuit Court, entered in this cause on June 23, 1903, upon the return of the mandate of the Circuit Court of Appeals (see Exhibit "F," p. 71 of petition for *certiorari*), contains the following:

7. And it not appearing that defendant, as such agent, has received any profits, gains and advantages which have arisen or accrued to it from the infringement of the said trade-name and designation "Remington" by using or selling typewriting machines, having thereon the name "Remington" as the name or part of the name of said writing machines, *an account thereof is denied without prejudice to any right of the complainant to recover the same of the principal, the Remington-Sholes Company.*

8. And it is further ordered, adjudged and decreed that an injunction be forthwith issued herein perpetually enjoining the defendant, "Howe Scale Co. of 1886," its officers, clerks, attorneys, agents, servants and workmen and all persons acting in privity with it or them, or claiming through or under it or them from in any manner whatsoever making use of the designation "Remington" as the name or part of the name of any typewriting machine whatsoever manufactured by the Remington-Sholes Company, or by defendant or any person or concern, and from selling, offering, exposing or advertising

for sale by means of signs, show-cards, catalogues, circulars, publications, advertisements or by word of mouth, or in any manner whatsoever, typewriting machines manufactured by said Remington-Sholes Company or by defendant, or any person or concern under the name of or as "Remington-Sholes," or by any designation of which the word Remington shall constitute a part.

9. And it is further ordered, adjudged and decreed that an injunction be forthwith issued herein perpetually enjoining the said defendant, "Howe Scale Co. of 1886," its officers, clerks, attorneys, agents, servants and workmen, and all persons acting in privity with it or them, or claiming through or under it or them, from in any manner whatsoever making use of the word "Remington" as the whole or as the part of any name or designation whatsoever, which shall be marked upon, or affixed or applied by any means to typewriting machines, manufactured or sold by the said "Remington-Sholes" company, or by defendant, or any person or concern, and used by it or them in connection with the manufacture and sale of its or their writing machines and to distinguish and identify the same.

10. And it is further ordered, adjudged and decreed that the said complainant do recover of the defendant its costs, charges and disbursements in this suit in this Court, to be taxed by the clerk thereof, and that in default of the payment of the same the complainant have execution therefor.

Done in Court this 23d day of June, A. D. 1903, a day in said term.

HOYT H. WHEELER,
Judge.

This decree, as the Court will perceive, is in substance the same as the original decree of the Circuit

Court, modified only by the omission of that part of the original decree that related to the word "Rem-Sho" and the syllable "Rem." On pages 11 and 12 of the petition for *certiorari* are also stated the following facts, which will not be controverted:

"7. Your petitioners further show that the defense of this cause has from its inception been conducted wholly at the expense of your petitioner, Fay-Sholes Company, and by counsel of its own selection; that after the decision of his Honor Judge Wheeler enjoining the use of the name 'Remington-Sholes' and the trade-mark 'Rem-Sho' as aforesaid, and because of said decision your petitioner, Fay-Sholes Company (then bearing the name Remington-Sholes Company), ceased to mark its typewriting machines with the registered trade-mark 'Rem Sho' and with the inscription 'Remington-Sholes Company, Mfrs., Chicago,' and caused its corporate name to be changed from Remington-Sholes Company to Fay-Sholes Company, in keeping with the laws of the State of Illinois.

8. And your petitioner, Fay-Sholes Company, further shows that in October, 1901, complainant, Wyckoff, Seamans & Benedict, filed its bill of complaint in the United States Circuit Court for the Northern District of Illinois against your petitioner, Fay-Sholes Company (at that time still bearing the name Remington-Sholes Company); that said bill of complaint is based mainly upon the alleged infringement and violation by your petitioner, Fay-Sholes Company (while trading under the name Remington-Sholes Company), of complainant's alleged trade-mark 'Remington' by the use by your petitioner, Fay-Sholes Company, upon and in connection with the sale of its typewriting machines of its registered trade-mark 'Rem-Sho' and the inscription 'Remington-Sholes Company, Mfrs., Chicago,' and for alleged unfair trade competition arising chiefly from the use by

your petitioner, Fay-Sholes Company, of its trademark 'Rem-Sho' and of its former corporate name 'Remington-Sholes Company' in connection with the sale of typewriting machines of your petitioner's manufacture. That after the answer of your petitioner, Fay-Sholes Company, was filed to said bill of complaint, an order was entered in said cause staying proceedings therein until the determination of this present cause in the United States Circuit Court of Appeals and in the United States Supreme Court. But in said order so staying said cause it was provided that if this present cause resulted in favor of complainant, Wyckoff, Seamans & Benedict, the said cause in which said order was so entered should proceed at once to an accounting; that said order so entered in said cause is still in force."

In this last mentioned suit, brought by complainant against the Remington-Sholes Company, there was entered on July 1, 1902, the following order, which appears upon page 10 of "Reply brief for Petitioners on Application for Writ of *Certiorari*":

Order.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

TUESDAY, July 1, 1902.

Present—Hon. CHRISTIAN C. KOHLSAAT,
District Judge.

WYCKOFF, SEAMANS and BENEDICT 26,032. vs. REMINGTON-SHOLES CO.	In Chancery.

Now come the parties by their solicitors and now comes on to be heard the motion of the defendants

to stay further proceedings herein until the determination of a suit pending in the United States Circuit Court of Appeals for the Second Circuit. And the Court having considered said motion, **and counsel having stipulated in open court that the questions involved in said cause, pending in the Second Circuit, are in the main like those involved in this case,** it is ordered that further proceedings herein be stayed until the said United States Circuit Court of Appeals for the Second Circuit shall have decided the same, or if appealed or certified, to the Supreme Court of the United States, then such stay of proceedings shall continue until said last named court shall have announced its findings therein; but if said cause shall not be certified or appealed to the Supreme Court of the United States from said Second Circuit, then this stay of proceedings shall cease and terminate with leave to complainant to proceed at once to an accounting, if the finding of said Court shall be in its favor.

NORTHERN DISTRICT OF ILLINOIS, Northern Division, } ss.:

I, MARSHALL E. SAMPSELL, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said court on the first day of July, A. D. 1902, in the cause wherein Wyckoff, Seamans & Benedict is the complainant and Remington-Sholes Company the defendant, as the same appears from the original records of said Court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said district, this 16th day of November, A. D. 1903.

MARSHALL E. SAMPSELL,
Clerk.

[SEAL.]

A consideration of the foregoing facts will show that the suit against the Remington-Sholes Company, now pending in the Circuit Court for the Northern District of Illinois, involved the same vital questions at issue in this cause. And, although temporarily suspended, involves the accounting that was denied "without prejudice," in the present suit against the Howe Scale Company.

The controversy is not only real, but if this court should sustain the sweeping decrees of the lower courts, the controversy may well end in disaster to the defendant.

October Term, 1904.

Respectfully submitted,

AUSTEN G. FOX,
GEORGE P. FISHER, Jr.,
Of Counsel for The Remington-Sholes Company.